

1
2
3
4
5
6
7
8 DAVID SCOTT PEASLEY,
9 Plaintiff,
10 v.
11
12 WARDEN M. SPEARMAN, et al.,
13 Defendants.
14
15

16 Case No. 15-CV-1769 LHK (PR)
17
18
19
20
21
22
23
24
25

**ORDER DENYING PLAINTIFF'S
MOTIONS FOR SUMMARY
JUDGMENT; ORDER TO LOCATE
COUNSEL**

26 Re: Dkt. Nos. 76, 97
27
28

Plaintiff, a California prisoner proceeding *pro se*, has filed an amended civil rights
complaint, pursuant to 42 U.S.C. § 1983. In the amended complaint, plaintiff alleged that
defendants were deliberately indifferent to his serious medical needs by failing to adequately treat
his Type-I diabetes.¹ Before the court are plaintiff's motions for summary judgment. For the
reasons stated below, the court denies plaintiff's motions for summary judgment, and orders the
Federal Pro Se Program to locate counsel to represent plaintiff.

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
779
780
781
782
783
784
785
786
787
788
789
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
809
810
811
812
813
814
815
816
817
818
819
819
820
821
822
823
824
825
826
827
828
829
829
830
831
832
833
834
835
836
837
838
839
839
840
841
842
843
844
845
846
847
848
849
849
850
851
852
853
854
855
856
857
858
859
859
860
861
862
863
864
865
866
867
868
869
869
870
871
872
873
874
875
876
877
878
879
879
880
881
882
883
884
885
886
887
888
889
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
909
910
911
912
913
914
915
916
917
918
919
919
920
921
922
923
924
925
926
927
928
929
929
930
931
932
933
934
935
936
937
938
939
939
940
941
942
943
944
945
946
947
948
949
949
950
951
952
953
954
955
956
957
958
959
959
960
961
962
963
964
965
966
967
968
969
969
970
971
972
973
974
975
976
977
978
979
979
980
981
982
983
984
985
986
987
988
989
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1899
1900<br

1

BACKGROUND

2

3

4

5

Plaintiff suffers from Type-I diabetes, which means that plaintiff cannot produce insulin. Thus, according to plaintiff, he needs two types of insulin: one is used as a base to support the insulin levels between meals, and the other – rapid-acting insulin – is used to offset the foods that he eats. This second type of insulin is critical because it balances the food and insulin.

6

7

8

9

10

11

12

13

14

15

16

In the amended complaint, plaintiff generally alleges that in May 2013, Dr. Ahmed began discontinuing plaintiff's insulin and blood sugar testing plan. (Count 1.) As a result, plaintiff contracted ketoacidosis which defendants failed to treat. (Count 4.) Plaintiff also claims that defendants had a policy of denying non-formulary medications and treatments, even when recommended by a specialist. (Counts 3, 5, 11-13.) Plaintiff lists several instances when Chief Medical Officer ("CMO") Ellis, Dr. Bright, and Dr. Ahmed denied plaintiff insulin and blood sugar level testing, against the recommendations of a specialist. (*Id.*) Plaintiff further alleges that Dr. Ahmed was deliberately indifferent in treating plaintiff's asthma and foot. (Counts 2, 14.) Finally, plaintiff alleges that Officers Lopez, Gibson, and Orozco denied plaintiff access to medical care and food, despite knowing that plaintiff was a diabetic. (Counts 6-7.)

PROCEDURAL HISTORY

17

18

19

20

Plaintiff's amended complaint raised 15 Counts. After screening the amended complaint, the court dismissed Counts 10 and 15 in its order of service. On July 18, 2016, defendants filed a motion to dismiss Counts 1-9, 11-13 based on res judicata, and moved for summary judgment on Counts 2 and 14. Plaintiff filed an opposition, and defendants filed a reply.

21

22

23

On May 23, 2016, plaintiff filed a motion for summary judgment on Counts 6-9. On July 19, 2016, defendants filed an opposition, essentially parroting their res judicata argument on Counts 1-9 and 11-13, and summary judgment argument on Counts 2 and 14.

24

25

26

On July 29, 2016, plaintiff filed a motion for summary judgment on Counts 1-5, 11-14.

On August 12, 2016, defendants filed a statement that their previously filed July 19, 2016

Case No. 15-CV-1769 LHK (PR)

ORDER DENYING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT; ORDER TO LOCATE COUNSEL

1 opposition should serve as an opposition to plaintiff's second motion for summary judgment as
2 well. On August 29, 2016, plaintiff filed replies to defendants' opposition.

3 On March 6, 2017, the court denied defendants' motion to dismiss Counts 1-9 and 11-13
4 based on res judicata, granted defendants' motion for summary judgment on Counts 2 and 14, and
5 referred the matter to settlement proceedings. The court informed the parties that if settlement
6 proceedings were unsuccessful, the court would then resolve plaintiff's motions for summary
7 judgment. On May 11, 2017, the court was informed that the parties were unable to settle.

8 The court now addresses plaintiff's motions for summary judgment which have been fully
9 briefed. The remaining counts are Counts 1, 3-9, and 11-13. Counts 8 and 9 name Lopez as the
10 sole defendant. Because Lopez has not appeared, the court will not address Counts 8 or 9 at this
11 time. Thus, the remaining counts for consideration in this order are Counts 1, 3-7, and 11-13.

12 For the reasons stated below, the court denies plaintiff's motions for summary judgment on
13 Counts 1, 3-7, and 11-13, and orders the Federal Pro Se Program to locate counsel for plaintiff.

14 **STANDARD OF REVIEW**

15 Summary judgment is proper where the pleadings, discovery and affidavits show that there
16 is "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a
17 matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of
18 the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a
19 material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
20 the nonmoving party. *See id.*

21 The court will grant summary judgment "against a party who fails to make a showing
22 sufficient to establish the existence of an element essential to that party's case, and on which that
23 party will bear the burden of proof at trial [,] . . . since a complete failure of proof concerning an
24 essential element of the nonmoving party's case necessarily renders all other facts immaterial."

25 *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party for summary

1 judgment bears the initial burden of identifying those portions of the pleadings, discovery and
2 affidavits which demonstrate the absence of a genuine issue of material fact. *See id.* at 323.
3 Where the moving party will have the burden of proof on an issue at trial, it must affirmatively
4 demonstrate that no reasonable trier of fact could find other than for the moving party. *Id.*

5 Once the moving party meets its initial burden, the nonmoving party must go beyond the
6 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a
7 genuine issue for trial.” Fed. R. Civ. P. 56(e). “This burden is not a light one. The non-moving
8 party must show more than the mere existence of a scintilla of evidence.” *In re Oracle*
9 *Corporation Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Liberty Lobby*, 477
10 U.S. at 252). “In fact, the non-moving party must come forth with evidence from which a jury
11 could reasonably render a verdict in the non-moving party’s favor.” *Id.* (citing *Liberty Lobby*, 477
12 U.S. at 252). If the nonmoving party fails to make this showing, “the moving party is entitled to
13 judgment as a matter of law.” *Celotex Corp.*, 477 U.S. at 323.

14 For purposes of summary judgment, the court must view the evidence in the light most
15 favorable to the nonmoving party; if the evidence produced by the moving party conflicts with
16 evidence produced by the nonmoving party, the court must assume the truth of the evidence
17 submitted by the nonmoving party. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).
18 The court’s function on a summary judgment motion is not to make credibility determinations or
19 weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific*
20 *Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

21 DISCUSSION

22 I. Relevant law

23 Deliberate indifference to a prisoner’s serious medical needs violates the Eighth
24 Amendment’s proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S.
25 97, 104 (1976). A determination of “deliberate indifference” involves an examination of two

1 elements: the seriousness of the prisoner’s medical need and the nature of the defendant’s response
2 to that need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*
3 *grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

4 A “serious” medical need exists if the failure to treat a prisoner’s condition could result in
5 further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* (citing *Estelle*,
6 429 U.S. at 104). Insulin-dependent Type-I diabetes is a serious medical condition for purposes of
7 Eighth Amendment analysis. *Lolli v. County of Orange*, 351 F.3d 410, 419 (9th Cir. 2003).
8 Failing to provide a person suffering from Type-I diabetes with proper food or insulin creates a
9 serious risk of harm. *Id.* at 419-20.

10 A prison official is deliberately indifferent if he knows a prisoner faces a substantial risk of
11 serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v.*
12 *Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only “be aware of facts from
13 which the inference could be drawn that a substantial risk of serious harm exists,” but “must also
14 draw the inference.” *Id.* Consequently, in order for deliberate indifference to be established, there
15 must exist both a purposeful act or failure to act on the part of the defendant and harm resulting
16 therefrom. *See McGuckin*, 974 F.2d at 1060.

17 II. Analysis

18 Plaintiff moves for summary judgment on Counts 1, 3-7, and 11-13. Defendants have filed
19 an opposition, in which they relied primarily on res judicata for Counts 1-9 and 11-13. Plaintiff
20 has filed replies. The court previously addressed defendants’ res judicata argument in its March 6,
21 2017 order, and concluded that res judicata was inapplicable. Thus, the only question remaining is
22 whether plaintiff is entitled to summary judgment. To resolve that question, the court views the
23 facts in the light most favorable to defendants, the non-moving party.

1 A. Count 1

2 Plaintiff alleges that in Dr. Ahmed, CMO Ellis, and Warden Spearman improperly
3 discontinued plaintiff's insulin and blood sugar level tests, disallowed urgent care and food for
4 plaintiff, and forced plaintiff to suffer ketoacidosis. In May 2013, Dr. Ahmed was plaintiff's
5 treating physician. Dkt. No. 97 ("Pl. Mot. For Sum. Judg.") at 11. On May 26, 2013, Dr. Ahmed
6 discontinued plaintiff's rapid-acting insulin and reduced plaintiff's daily blood sugar level testing.
7 Dkt. No. 97 at 11-12. The rapid-acting insulin dose for plaintiff's pre-meals was lowered from
8 almost 50 units every day to zero. *Id.* Plaintiff was given "lantus" insulin instead, which requires
9 the additional use of fast-acting insulin. *Id.* and Ex. B at 4. On June 6, 2013, Dr. Ahmed told
10 plaintiff that it was prison policy to "run the [blood sugar levels] higher." Dkt. No. 97 at 41. On
11 June 12, 2013, however, Dr. Ahmed reduced the lantus and, after discussing the issue with CMO
12 Ellis, ordered a small amount of rapid-acting insulin to add to plaintiff's medication. *Id.* at 42.

13 Plaintiff states that without the rapid-acting insulin, plaintiff felt he could not eat without
14 endangering himself, and as a result of not eating, sometime after May 26, 2013, plaintiff
15 contracted ketoacidosis which went untreated for over a month. Dkt. No. 97 at 13-14. Plaintiff
16 alleges that even though plaintiff requested help and submitted four emergency notices, Dr.
17 Ahmed continued to reduce plaintiff's blood sugar level testing and, until June 12, 2013, refused
18 to order plaintiff fast-acting insulin. *Id.* at 12. Plaintiff informed CMO Ellis and Warden
19 Spearman, but neither CMO Ellis nor Warden Spearman intervened. *Id.* at 13.

20 Defendants provide a declaration from non-defendant Dr. Barnett, who asserts that he
21 reviewed all of plaintiff's medical records from 2008 through 2016. Barnett Decl. ¶ 5. In Dr.
22 Barnett's opinion, based on plaintiff's medical records, Dr. Ahmed provided adequate care for
23 plaintiff's diabetes.

24 Outside of plaintiff's apparent self-diagnosis of ketoacidosis, plaintiff has not provided any
25 evidence to affirmatively demonstrate that he in fact contracted ketoacidosis. Plaintiff offers no

1 nonconclusory evidence to support his claim that he contracted ketoacidosis or that he contracted
2 ketoacidosis because of Dr. Ahmed's actions. Plaintiff's claim that Dr. Ahmed ignored four
3 emergency notices to medical care is also unsupported by any facts to demonstrate that Dr. Ahmed
4 received those notices or was otherwise aware of plaintiff's emergency requests.

5 Viewing the evidence in the light most favorable to defendants, the court cannot find that
6 no reasonable trier of fact could find for defendants on plaintiff's allegation that Dr. Ahmed,
7 knowing that plaintiff would face a substantial risk of serious harm, discontinued plaintiff's rapid-
8 acting insulin from May 26, 2013 to June 12, 2013, and reduced the number of times plaintiff
9 could test his blood sugar level. Nor can the court find, based on the evidence presented, that no
10 reasonable trier of fact could find for defendants on plaintiff's allegation that CMO Ellis and
11 Warden Spearman were deliberately indifferent for failing to intervene. Plaintiff has not presented
12 sufficient evidence to establish that defendants' course of treatment "was medically unacceptable
13 under the circumstances [and] chosen in conscious disregard of an excessive risk to [the
14 prisoner's] health." *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004); *see Jackson v.*
15 *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (recognizing that a mere "difference of medical
16 opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference.").

17 Plaintiff's motion for summary judgment on Count 1 is denied.

18 B. Count 3

19 On July 14, 2014, Dr. Kumar, an endocrinology specialist, recommended that plaintiff stop
20 using the insulin humulin-r, and change it to humolog. Dkt. No. 97-2 at 27. Humolog is a rapid-
21 acting insulin. Dr. Ahmed filled out a nonformulary drug request form to get approval to order
22 humolog for plaintiff. Dkt. No 97-2 at 30. Despite Dr. Kumar's recommendation for humolog,
23 on August 1, 2014, CMO Ellis and Dr. Bright denied the request for humolog because it was a
24 non-formulary medication. Dkt. No. 31 at 39-40. Plaintiff alleges that "formulary" refers to a
25 standard or minimum level of care that the California Department of Corrections and

1 Rehabilitation uses. Dkt. No. 31 at 40. In denying the request for humolog, Dr. Bright stated that
2 humolog did not provide better control than humulin-r, and that humolog was more difficult to
3 manage in the prison setting. *Id.* Plaintiff asserts that because humolog was a better insulin for
4 plaintiff, CMO Ellis and Dr. Bright were deliberately indifferent when they denied its use for
5 plaintiff. Plaintiff states that without humolog, he suffers from an elevated sugar level, nausea,
6 swollen feet, and a shortened life span. Dkt. No. 31 at 40.

7 Plaintiff has attached as evidence, medical notes from December 2009 from San Quentin
8 State Prison and January 2008 from what appears to be Sutter Health. Dkt. Nos. 41-42. Both
9 medical notes reflect that plaintiff was using humolog. *Id.* Plaintiff's records also show that Dr.
10 Kumar did recommend changing humulin-r to humolog.

11 However, plaintiff provides no non-conclusory evidence that the refusal to change
12 humulin-r to humolog caused plaintiff harm, which is a necessary element to a claim of deliberate
13 indifference to serious medical needs. There is also no evidence that Dr. Bright or CMO Ellis
14 denied the humolog knowing that plaintiff would face a substantial risk of harm without it.
15 Further, although Dr. Bright was not a treating physician, his reason for denying the change
16 appears to be based on his medical opinion that humolog did not provide better control than
17 humulin-r.

18 The court notes that in *Snow v. McDaniel*, 681 F.3d 978, 985-87 (9th Cir. 2012), the Ninth
19 Circuit reversed a grant of summary judgment to defendants when they repeatedly denied hip
20 surgery to a prisoner for three years, instead opting to use non-surgical interventions despite
21 receiving two specialists' consistent recommendations that plaintiff required hip surgery. While
22 the facts in *Snow* are certainly more egregious, the Ninth Circuit reasoned that "a medication-only
23 course of treatment may have been medically acceptable for a certain period of time, the question
24 remains whether it was medically unacceptable and subjectively reckless to ignore a "long term"
25 recommendation for three years, or to ignore "emergency" and "urgent" requests for more than

1 two years.” *Id.* at 988. Here, there are insufficient facts to conclude that denying the change from
2 humulin-r to humolog was medically unacceptable under the circumstances or that defendants
3 chose this course of treatment in conscious disregard of an excessive risk to plaintiff’s health. *See*
4 *Toguchi*, 391 F.3d at 1058.

5 Based on the current record, plaintiff has not met his initial burden of affirmatively
6 showing that no reasonable juror could find for defendants. Plaintiff’s motion for summary
7 judgment on Count 3 is denied.

8 C. Count 4

9 In Count 4, plaintiff alleges that he contracted ketoacidosis, which resulted in his failure to
10 eat because the lack of rapid-acting insulin made him fear eating lest his blood sugar level got too
11 high. Dkt. No. 31 at 43-44. According to plaintiff, ketoacidosis occurs as soon as blood sugar
12 levels exceed 250. *Id.* at 44. Plaintiff claims that because of the ketoacidosis, he suffered severe
13 nausea, sleepiness, leg aches, swollen feet, and body aches. *Id.* at 43-44. Plaintiff states that Dr.
14 Ahmed, CMO Ellis, and Warden Spearman were aware of the ketoacidosis but failed to treat him
15 for over one month. *Id.*

16 Plaintiff has submitted as evidence apparent self-reported blood sugar levels from
17 unspecified dates that show when his blood sugar levels exceeded 250. Dkt. No. 97 at 47-48.
18 However, there is no evidence such as medical records reflecting a ketoacidosis diagnosis to
19 support plaintiff’s claim that he was suffering from ketoacidosis, or that defendants knew plaintiff
20 believed he was suffering from ketoacidosis. Even relying on plaintiff’s exhibit of a publication
21 regarding Type-I diabetes, the description of ketoacidosis suggests that the development of
22 ketoacidosis may not occur only when blood sugar levels exceed 250, but also when blood ketones
23 are above certain levels. Dkt. No. 97-3 at 5-7. Plaintiff has not submitted any evidence regarding
24 his blood ketone levels.

1 Based on this record, plaintiff has not met his initial burden and the court cannot find that
2 no reasonable juror could find for defendants, and plaintiff's motion for summary judgment on
3 Count 4 is denied.

4 D. Count 5

5 Plaintiff alleges that in April and May 2014, Dr. Ahmed, Warden Spearman, and CMO
6 Ellis were deliberately indifferent to his serious medical needs when they did not allow plaintiff to
7 possess his own glucometer, which is a device for testing one's blood sugar level. Dkt. No. 31 at
8 50. In 2009, while housed at San Quentin State Prison, plaintiff was permitted to have a "keep on
9 person" ("KOP") glucometer. Dkt. No. 97-3 at 13, 32. Plaintiff claims that having a glucometer
10 is a medical necessity and defendants' policy of disallowing a personal glucometer purposefully is
11 causing him harm.

12 Plaintiff has provided no evidence to demonstrate that defendants knew that denying
13 plaintiff a KOP glucometer would result in a substantial risk of serious harm or that defendants
14 disregarded such a risk. Plaintiff acknowledges that different prisons have different policies
15 regarding a KOP glucometer, and then makes a conclusory statement that denying a KOP
16 glucometer causes harm. While having the ability to check one's blood sugar level at all times is
17 certainly convenient, there is no evidence from which to infer that not having a KOP glucometer
18 resulted in a substantial risk of serious harm or that defendants knew that not having a KOP
19 glucometer would result in a substantial risk of serious harm. Based on this record, plaintiff has
20 not met his initial burden and the court cannot find that no reasonable juror could find for
21 defendants. Plaintiff's motion for summary judgment on Count 5 is denied.

22 E. Count 6

23 In Count 6, plaintiff alleges that defendants Lopez, Gibson, and Orozco denied plaintiff
24 urgent medical treatment. Dkt. No. 31 at 56. Plaintiff states that he informed them of an urgent
25 medical need, and they knew that plaintiff was a diabetic who required daily frequent access to

1 medication and meals, yet left plaintiff in his locked cell. *Id.* at 57; Dkt. No. 76-1 at 5.
2 Specifically, plaintiff alleges that on September 7, 2013, plaintiff had his door marked for medical
3 release. *Id.* at 11. Gibson and Orozco spoke with an unnamed nurse, who was only permitted to
4 dispense medication and was unable to test plaintiff's blood sugar level without a specific order to
5 do so. *Id.* Plaintiff claims that a previous nurse told plaintiff to get to the medical clinic and
6 someone at the clinic would test his blood sugar level. *Id.* Gibson and Orozco ignored plaintiff's
7 request to go to the medical clinic for this unscheduled blood sugar level test and left him in his
8 cell. *Id.*

9 According to the informative chrono authored by Gibson that plaintiff attached in his
10 exhibits, at the time of these events, plaintiff told Gibson that he wanted to get a blood sugar level
11 test so that plaintiff would know how much food he should eat before bed. Dkt. No. 76-1 at 15.
12 Gibson confirmed that plaintiff was not scheduled for a diabetic blood check test at that time, and
13 denied plaintiff's request. *Id.*

14 Viewing the evidence in the light most favorable to defendants, the court cannot say that
15 plaintiff has met his burden of proving that no reasonable trier of fact would find for defendants.
16 There is insufficient evidence to find as a matter of law that Gibson and Orozco denied plaintiff's
17 self-described urgent request to go to the medical clinic for a blood sugar level check knowing that
18 disallowing plaintiff to do so opened plaintiff up to a substantial risk to his health. Nor is there
19 evidence that plaintiff looked or acted ill, or in need of medical attention. There is no evidence to
20 suggest that defendants inferred that plaintiff would be at serious risk if they forbade him from
21 receiving a blood sugar level test at that moment. *Cf. Lolli*, 351 F.3d at 420-21 (finding a genuine
22 issue of material fact as to whether prison officers consciously disregarded a serious risk to
23 plaintiff's health). Moreover, it is unclear what harm plaintiff suffered as a result of the
24 unspecified delay before plaintiff in fact received a blood sugar level test.

1 Plaintiff fails to affirmatively demonstrate that Orozco or Gibson responded to plaintiff
2 with deliberate indifference. *See Farmer*, 511 U.S. at 834. Here, the refusal to provide plaintiff
3 with an unscheduled blood sugar level test on a single occasion may be characterized as “an
4 ‘isolated occurrence’ or an ‘isolated exception,’” which the Ninth Circuit has determined
5 “militates against a finding of deliberate indifference.” *See McGuckin*, 974 F.2d at 1060. In this
6 regard, based on plaintiff’s evidence, defendants’ alleged misconduct on this one occasion cannot
7 be said to amount to a failing of constitutional magnitude as a matter of law.

8 Based on the current record, plaintiff has not affirmatively demonstrated that the delay in
9 getting a blood sugar level check caused further harm, and that Gibson and Orozco knew this to be
10 the case. “In order to know of the excessive risk, it is not enough that the person merely ‘be aware
11 of facts from which their inference could be drawn that a substantial risk of serious harm exists, []
12 he must also draw that inference.’” *See Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th
13 Cir. 2002) (quoting *Farmer*, 511 U.S. at 842), *overruled on other grounds by Castro v. County of*
14 *Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016). Here, plaintiff has presented evidence
15 suggesting that Gibson or Orozco delayed plaintiff’s request for medical care because plaintiff did
16 not have a scheduled blood sugar level test at that time. Plaintiff has not presented evidence
17 suggesting that Gibson or Orozco was aware of any substantial risk of serious harm to plaintiff if
18 plaintiff did not receive a blood sugar level test when he asked for one.

19 Accordingly, plaintiff’s motion for summary judgment on Count 6 is denied.

20 F. Count 7

21 In Count 7, plaintiff alleged that on July 14, 2013, Officer Orozco denied plaintiff access
22 to a meal after plaintiff received his insulin injection, yet allowed the other inmates to eat. Dkt.
23 No. 31-1 at 6, 8. Diabetic prisoners had their cells specially unlocked so that they may receive
24 their medications. Dkt. No. 76-2 at 7. Around 4:00 p.m., which was within the 30 minutes after
25 plaintiff received an insulin injection, Orozco refused to allow plaintiff to access his meal even

1 though other inmates were allowed to access their meals, and no food or snack was provided to
2 plaintiff. Dkt. No. 31-1 at 7; Dkt. No. 76-2 at 3. Orozco accused plaintiff of not following orders,
3 so Orozco told plaintiff to sit in the cell while Orozco let other inmates out to eat. Dkt. No. 76-2
4 at 7. According to the administrative grievance filed by plaintiff, Orozco claimed that leaving
5 plaintiff locked in plaintiff's cell was an accident. *Id.* at 16. Plaintiff argues that Orozco
6 intentionally left plaintiff in his cell during meal time. As a result of the failure to allow plaintiff
7 to eat, plaintiff felt shaky and weak, and was unable to stand. Plaintiff was later treated for an
8 emergency diabetic reaction.

9 Viewing the evidence in the light most favorable to defendants, the court cannot say that
10 plaintiff has met his burden of demonstrating that no reasonable trier of fact would find for
11 defendants. Based on the current record, plaintiff has not affirmatively shown that Orozco knew
12 that denying or delaying plaintiff a meal on July 14, 2013 opened plaintiff up to a substantial risk
13 of serious harm. *See Gibson*, 290 F.3d at 1188. Here, plaintiff has presented evidence suggesting
14 that Orozco accidentally left plaintiff in plaintiff's cell. At the very least, this is an issue of
15 credibility which the court is not permitted to decide at this stage of the proceedings.

16 Accordingly, plaintiff's motion for summary judgment on Count 7 is denied.

17 G. Counts 11, 12, and 13

18 In Count 11, plaintiff alleged that on April 3, 2015, Dr. Ahmed recommended prescribing
19 a non-formulary drug to treat plaintiff's diabetes, as was recommended by a specialist. Dkt. No.
20 97-4 at 19, 23; Dkt. No. 31-1 at 32-35. According to the form, Dr. Bright denied the non-
21 formulary drug, stating that "regular insulin at night is too dangerous." Dkt. No. 97-4 at 23.

22 In Count 12, plaintiff alleges that on April 11, 2015, Dr. Bright and CMO Ellis denied Dr.
23 Ahmed's recommendation for blood sugar level testing, as recommended by Dr. Kumar. Dkt. No.
24 97-4 at 38-39; Dkt. No. 31-1 at 45-46. Plaintiff also alleges that Dr. Ahmed stopped the
25 specialist's recommendation to test plaintiff's blood sugar level at night. Dkt. No. 97-4 at 39.

1 In Count 13, plaintiff alleged that in April 2015, Dr. Ahmed, CMO Ellis, and Dr. Bright
2 rejected Dr. Kumar's recommendations, which effectively denied plaintiff food because plaintiff
3 was unable to properly monitor and manage his blood sugar levels. Dkt. No. 31-1 at 51-52; Dkt.
4 No. 97-5 at 2.

5 Plaintiff makes conclusory assertions that the prison's treatment of his diabetes, which did
6 not follow Dr. Kumar's recommendations is unsafe. *Id.* at 4. However, plaintiff does not provide
7 evidence to support the necessary element that defendants knew plaintiff faced a substantial risk of
8 serious harm if they failed to abide by Dr. Kumar's recommendations. Similar to Count 3, there
9 are insufficient facts to conclude that defendants' denial of a non-formulary drug or the reduction
10 of nighttime blood sugar level testing was medically unacceptable under the circumstances or that
11 defendants chose that course of treatment in conscious disregard of an excessive risk to plaintiff's
12 health. *See Toguchi*, 391 F.3d at 1058.

13 Based on the current record, plaintiff has not met his burden to show that no reasonable
14 juror could find for defendants. Plaintiff's motion for summary judgment on Counts 11, 12 and 13
15 is denied.

CONCLUSION

17 Plaintiff's motions for summary judgment are DENIED.

18 It appears that this case will be tried. The court concludes that counsel should be
19 appointed for plaintiff, and refers this case to Kevin Knestrick of the Federal Pro Se Program to
20 locate counsel. Upon an attorney being located to represent plaintiff, that attorney shall be
21 appointed as counsel for plaintiff in this matter until further order of the court.

IT IS SO ORDERED.

DATED: 9/26/2017

Lucy H. Koh
LUCY H. KOH
UNITED STATES DISTRICT JUDGE